

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

MARK A. WOODWORTH,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

DOCKET NUMBER WD70685

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: August 10, 2010

APPEAL FROM

The Circuit Court of Clinton County, Missouri
The Honorable Stephen K. Griffin, Judge

APPELLATE JUDGES

Division One: James M. Smart, Jr., Presiding Judge, and Mark D. Pfeiffer
and Cynthia L. Martin, Judges

ATTORNEYS

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MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

MARK A. WOODWORTH,)
)
Appellant,)
v.)
)
STATE OF MISSOURI,)
)
Respondent.)

WD70685

Clinton County

Before Division One Judges: James M. Smart, Jr., Presiding Judge, and
Mark D. Pfeiffer and Cynthia L. Martin, Judges

Mark A. Woodworth appeals the judgment of the Circuit Court of Clinton County denying his Rule 29.15 post-conviction motion, after an evidentiary hearing, in which Woodworth claims that the motion court deprived Woodworth of due process of law in his second trial for murder and, additionally, Woodworth claims he received ineffective assistance of trial counsel. On appeal, Woodworth presents three points, in which he argues that: (1) the motion court improperly denied access to discovery regarding the grand jury and two allegedly tainted trial jurors; (2) his trial counsel was ineffective for failing to properly advise Woodworth regarding a waiver of jury sentencing; and (3) his trial counsel was ineffective for failing to impeach one of the State's witnesses.

AFFIRMED.

Division One holds:

Woodworth's initial claim, that the motion court erred in denying him access to discovery about the jury and grand jury, was waived. A Rule 29.15 motion is not a substitute for a direct appeal. Consequently, constitutional claims which could be raised on direct appeal *must* be raised on the direct appeal or they are waived, unless rare and exceptional circumstances exist which would result in fundamental unfairness. Though he was aware of these issues at the time of his motion for a new trial and during his direct appeal, Woodworth did not raise them in either his motion for new trial or his direct appeal. Likewise, Woodworth fails to demonstrate that the

facts of his case presented a rare and exceptional circumstance. Consequently, we find that Woodworth waived this claim on appeal.

In his second point on appeal, Woodworth maintains that the motion court erred in finding that he was not prejudiced as a result of his trial counsel failing to recommend that he waive jury sentencing. Woodworth argues that if he had waived jury sentencing, the trial judge would have been required to limit his sentence to the minimum sentence he had received in his first trial. This argument fails for multiple reasons. At the time Woodworth was tried, the guilt and penalty phases of a trial were not bifurcated. As a result, even if the judge was limited in the manner Woodworth contends, there were valid strategic reasons for requiring the jury to have both the burden of finding guilt and assigning a sentence. Finally, Woodworth provided no testimony to establish that if he had been given the opportunity to waive jury sentencing, he would have done so. Accordingly, Woodworth has failed to proffer any evidence demonstrating that he was prejudiced by not being informed of his right to waive jury sentencing.

Finally, we conclude that Woodworth's contention that his trial counsel was ineffective for failing to use impeaching evidence is without merit. Woodworth argues on appeal that his trial counsel's failure to impeach a witness was due to the attorney's lack of familiarity with Missouri's rules of evidence and the impeaching evidence available. We disagree. Woodworth's trial counsel's trial strategy was to show that another suspect had motive, opportunity, and a violent propensity. Woodworth's trial counsel elicited testimony from that suspect to enable him to argue that theory. The decision of trial counsel not to utilize further impeaching evidence was sound trial strategy and was not ineffective assistance of counsel.

Opinion by: Mark D. Pfeiffer, Judge

August 10, 2010

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